IS THE COMMON LAW RELATION OF JUDGE AND JURY SUBJECT TO LEGISLATIVE CHANGE?

THE usefulness of juries is like that of certain drugs, in that, when taken scientifically and in proper proportion to other medicinal agencies, they possess valuable preventive and curative properties; taken otherwise, they may become dangerous. Hence, the danger of impairment of the juristic value of the jury, through a disturbance of the constitutional balance of power, may be as great as the destruction of it. This is a practical consideration as well as a scientific one, since it involves the sacrifice of the great common law principles coeval with its creation and that recommended themselves to Hamilton, Jefferson, Ellsworth and Madison. Therefore a people possessed of the noblest intentions, but trying to steer a course between the Charybdis of the whirlpool of demagogic flattery, passion and prejudice, and the Scylla of the eternal rock of principles, will do well, occasionally, to test their governmental compasses by the pioneer viewpoint, if not the spirit thereof. The trial by jury adopted and preserved by our ancestors, was according to the course of the common law, and the perpetuation of those principles thereby becomes the most sacred obligation of good citizenship. When the American Republic was launched upon the governmental seas it was not without a charted course.

> "The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that 'the respective Colonies are entitled to the common law of England and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, *according to the course of the common law.*' 1 Jour. Cong. 28. The Ordinances of 1787 provided that the Northwest Territory should always be entitled to the benefit of the writ of habeas corpus and of the trial by jury and of judicial proceedings, *according to the course of the common law.* 1 Charters and Constitutions, 431." [1]

[1] Capital Traction Co. *v.* Hof, 174 U. S. 1, 6.

Some Common Law Elements of a Trial.

According to the accepted theories of 1776 and of today, absolutism has no place in jurisprudence, for coördinated moderation and patriotism and profundity, alone, assure the greatest certainty of justice. In the words of Sir Matthew Hale, "as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges." Trial by jury is either a *right* or a *privilege;* if the former, and it is so expressed in the Constitution, it follows that its use cannot be dispensed with and, therefore, the only legislative question is the ***manner of its use*** or the measure of the participation of the jury.

Its Province a Fixture in the Federal Courts.

The English rules at the present time—though not at the time of the adoption of the American Constitution—specify the issues where it may be demanded as a matter of right;[2] in America it is organically a right that must be expressly waived. In England and in the American federal courts and in many state courts, its participation in the trial is subject to the "direction and superintendence" of the judge. It has steadily followed one course in the federal courts—that of the common law of 1776. In some states its power is subject only to instructions in the law of the case, but with power in the judge to set aside a verdict given contrary to the evidence. In this instance the judge illogically, "superintends and directs" afterwards, and not before the verdict. Whether this be a distinction, with or without a difference, is later to engage our thoughts. The power to set aside a verdict has been a right and a duty of the courts since "*attaints* began to be disused and new trials introduced in their stead," and is, therefore, as ancient as the jury itself.[3]

Empiricism Rampant.

Unmindful of its history and origin, there are iconoclasts, influenced by splendid sentimental impulses, so reckless as to

[2] Jenks, Short History of English Law, p. 369.
[3] Blackstone, Bk. III, p. 375.

wish to destroy centuries of established science, as embodied in the course of the common law, by taking away every limitation upon the jury and leaving it, instead of the judge, the directing genius of the trial, thereby permitting inexperience and human impulse to perform the sacred office of directing the administration of justice. This danger was foreseen by Blackstone, Sir Matthew Hale and other great statesmen, as we shall soon see. It is well to remark that England is probably, a country of the greatest possible individual freedom, yet her people have strictly maintained and strengthened the ancient ideals of direction by the judge and have abolished the jury *as a right* in many cases, particularly in simple commercial disputes.

The Kind of Jury System the Pioneers Meant.

In fixing a standard, it should never be forgotten that, when "trial by jury" was slowly developing into its maturity, England was passing through her darkest days and her people were sorely tried by capricious or wicked princes; that great legal giants, like Hale and Blackstone, always solicitous of individual rights, approved of it in the detail in which it was adopted in America and that the pioneers embraced it and preserved it in that form, and not as it now is, in England or France, or in some of the American states. This is mentioned with the intention to impress the thought that no set of men, unless it were their English progenitors could hope to be more watchful or more solicitous of the public welfare than those who framed the United States Constitution. No one could have greater reason for being suspiciously careful. They were not of a mind to adopt English institutions which they did not deem to be essential and believe to be perfect and with the genius of which they were not thoroughly familiar. There is not now, nor has there ever been, the least suspicion that the makers of the Constitution were ignorant experimenters or seekers after innovation. Their every act reflected the pioneer spirit of individual responsibility and character, instead of governmental regulation, and if one of their great institutions has gone wrong it is not the fault of the institution. There should be a correct diagnosis before a remedy is hazarded.

Directing the Jury Has Become Ancient.

For so many years have the federal district judges "directed and superintended" the juries in their courts—to use the language of the Supreme Court of the United States [4]—that that important feature of the trial by jury might, in any event, be looked upon as a fixture in American national jurisprudence. That the venerable custom has been abused, is not surprising to the student and observer of the past four decades of American political history and its effect upon the federal courts in certain sections of the country; that this unjudicial conduct is ceasing, we shall endeavor to show, characterizes a new era in the federal district courts.

The power of "directing and superintending" the jury, as has been shown, is not a creature of statute or of the courts; nor is it a thing "to be taken on and off" at the pleasure of the legislative department—it inheres in the thing itself. *It would not be a trial by jury, according to the course of the common law, without the exercise of the directing power by the judge.* The United States Supreme Court has said this in so many words. The custom came to America, as will be authoritatively shown, as an integral part of the common law trial by jury. The Seventh Amendment adopted it, as it was then in the common law, as a standard and a measure, and to that the litigant is entitled as a matter of constitutional right. A deprivation of an essential portion of a thing can be as disastrous as a taking of the whole. In principle, it is the same.

Some Early History and Possible Origin.

The jury is preserved in the American Constitution as the protector of the common people and it has admirably fulfilled its purpose. Yet, it is interesting to observe the authentic belief that it originated in the later Roman Empire as an expediency to serve the purpose of the prince; that it was adopted in England for no good end; that its growth was encouraged by the Crown, because of the notice of land ownership thereby obtained, and was accelerated by an unholy competition for business between two English Courts—the Common Pleas and the King's

[4] Capital Traction Co. *v.* Hof, 174 U. S. 1, 15, 43 L. Ed. 874, 878.

Bench.[5] Though recognized in Sweden and Denmark and "all the Northern nations" and probably in Athens,[6] its development to its present usefulness and yet unmeasured value is but a part of the wholesome evolution of meritorious British juristic institutions under the guidance of a studious and liberty loving bench and bar and citizenship. The practice, in its full common-law flower exists today in the American federal courts, for in modern England, trial by jury is no longer a matter of right, except in certain specific issues.[7]

The Mental Attitude as an Influence.

Inasmuch as the viewpoint so often determines the light in which a thing is seen and so often the conclusion reached, a little philosophy may serve a useful purpose. It was a well known judge of a juvenile court who wished to destroy the institution of matrimony, because it seemed to him that all the children were criminals and that parents were no longer able to discipline their offspring. His spiritual horizon had become contracted by the dimming of the sunlight of faith in humanity. So, it has become that in political theory, the jury is the power that withholds the "mailed fist" of the corrupt, partial or oppressive judge. But in political science and juridical practice, it is and ever should be, the practical aid to the competent judge in the never ending effort to find the evasive truth and, furthermore, it is the means of exercising "the transcendent privilege that no man can be effected either in his property, his liberty, or his person but by the unanimous consent of twelve of his neighbors and equals." [8] If all judges were competent or ordinarily just, Sir Matthew Hale's common law system would continue to be ideal. The former is a questionable commentary upon the personnel selected as judges by the President and Senate and evidences an obvious effort to avoid an evil consequence of indiscretion. The latter sets a high ethical mark and requires that it shall be attained by both the appointing power and the ap-

[5] Jenks, Short History of English Law, p. 47.
[6] Blackstone, Bk. III, pp. 349-350.
[7] Jenks, Short History of English Law, p. 369.
[8] Blackstone, Bk. III, p. 379.

pointees, *for they are equally responsible.* It is the man that needs changing, if necessary, and not the thing preserved to their descendants by the pioneers. But there is a practical reason. The former makes of the judge a moderator and a mere figurehead, from which anomalous status, much of our court troubles now arise, while the latter requires of him judicial temperament, juristic equipment and juridical training. As Dean Lile has said, the latter "makes of law more nearly a science and justice a certain measure."

In practical operation, a trial should be two important coöperating agencies laboring to the same end, according to their respective qualifications, and so mingling their common efforts in a harmony of purpose as largely to nullify the human limitations of both. Coördination, not rivalry, should prevail.

THE MODEL USED BY THE MAKERS OF THE CONSTITUTION.

In the course of a carefully considered opinion in a case involving the validity of a waiver of jury trial, Mr. Justice Bower said:

> "In this, as in other respects, it (the Constitution) must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.
>
> "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that, undoubtedly, the framers of the Constitution were familiar with it." [9]

Previous to that time Mr. Justice White, in the case of Knowlton *v.* Moon,[10] had said:

> "The necessities which gave birth to the Constitution, the controversies which preceded its formation and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution in order, thereby, to be enabled to correctly interpret its meaning."

[9] Schick *v.* United States, 195 U. S. 65, 69, 49 L. Ed. 99, 102.
[10] 178 U. S. 41, 95, 44 L. Ed. 991.

WHAT BLACKSTONE SAID.

The Virtue of Trial by Jury.

"The impartial administration of justice, which secures both our person and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature and *the few* should be always attentive to the interests and good of *the many*." [11]

The Peril of Too Much Latitude.

"On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts." [12] * * *

The Judge Should Sum Up and Direct.

"When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence." [13]

Such is Mr. Blackstone's appreciation of the jury and of the judge and such is his measure of their province and such, the Supreme Court of the United States has formally declared, as we have seen, is the exact thing intended to be preserved to the people in the Seventh Amendment to the Federal Constitution.

WHAT THE FEDERAL COURTS HAVE DONE.

Now, let us see how the federal courts have proceeded in applying this ancient doctrine.

"In the courts of the United States, as in those of England from which our practice is derived, the judge in submitting

[11] Blackstone, Bk. III, p. 379.
[12] *Ibid.*
[13] *Ibid*, p. 375.

> a case to the jury may, at his discretion, whenever he thinks it necessary to assist them, call their attention to parts of the evidence he thinks important and express his opinion upon the facts; and the expression of such an opinion when no rule of law is incorrectly stated and *all matters of fact are ultimately submitted to the determination of the jury cannot be reviewed on a writ of error.*"

So said Mr. Justice Gray in the case of Vicksburg R. Co. *v.* Putman.[14] Judge Sprague, of the Massachusetts District Court, in 1863, had said:[15]

> "The trial by jury was, when the Constitution was adopted and for generations before that time had been here and in England, a trial of an issue of fact by twelve men under the *direction and guidance of the court. This direction and superintendence was an essential part of the trial.*"

What Is Not a Trial by Jury.

Judge Sprague's views having been adopted by Mr. Justice Gray in 1899, in the case of Capital Traction Co. *v.* Hof,[16] a brief review of that case is in order.

The appellant's sole contention was that "there had not been a constitutional trial by jury." It had been proceeded against in tort by Hof before a justice of the peace to recover damages laid at $300.00. The magistrate, upon request of plaintiff, Hof, empanelled a jury and went through all the accepted forms of a trial by jury, under authority of an Act of Congress to that effect. The case eventually reached the federal Supreme Court on the defendant's objection that "a trial before a justice of the peace with a jury was unknown at common law and was illegal and unconstitutional," as well as the plaintiff's contention "that no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." A decision, responding to these two contentions, became impossible without the definition of the common law jury, as preserved by the Seventh Amendment. In precise language, it was given.

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[14] 118 U. S. 545, 553, 30 L. Ed. 257.

[15] United States *v.* 1363 Bags of Merchandise, 2 Sprague 85, 88.

[16] 174 U. S. 1, 43 L. Ed. 874.

What Is a Constitutional Trial by Jury.

"Trial by jury," said the court, "in the primary and *usual sense of the term at the common law and in the American Constitution,* is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and *to advise them on the facts,* and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements yet to be found in the books.

"Lord Hale in his 'History of the Common Law' touching trial by jury, said: 'Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law emerging upon the evidence to direct them; and, also, in matters of fact, to give them great light and assistance by his weighing the evidence before them and observing where the question and knot of the business lies; and by showing them his opinion, even in matters of fact, which is a great advantage and light to laymen. *And, thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, also very much in investigating and enlightening the matter of fact, whereof the jury are the judges.*" [17]

Directing the Verdict.

We come now to the consideration of another, and an equally well-established element of trial by jury—the right of the judge to direct the verdict. The custom would seem to inhere in the juridical organization, albeit, its claim as a practice is not so great upon antiquity. It will prove convenient, for very obvious reasons, to review at the same time the decisions involving demurrer to the evidence, involuntary non-suits and the happy disappearance of the "scintilla doctrine." Its history

[17] Capital Traction Co. *v.* Hof, 174 U. S. 1, 13, 43 L. Ed. 874.

may be confined to its course in America since the custom seems not to have been coeval with the erection of the courts, but is a subsequent juridical evolution. A peremptory direction, it is interesting to observe in connection with what has just been said, and it is important that it be borne in mind, does not deprive one of a *constitutional* right preserved in the right to a trial by jury. It will appear later, however, that it has been held to be a legal right. We have contended that the right of the judge to sum up and superintend is organic and we know that a jury of a number less than twelve and one sitting with a justice of the peace is a deprivation of a constitutional right. So, the pursuit of the course of the courts may be continued.

IT IS NOT A DEPRIVATION OF A CONSTITUTIONAL RIGHT.

In Treat Co. *v.* The Standard Steel & Iron Co.,[18] Chief Justice Fuller said that:

> "The only ground relied on to sustain the jurisdiction of this court is that the case 'involves the construction or application of the Constitution of the United States;' *because plaintiff in error was deprived of the right of trial by jury.* But it is well settled that where the trial judge is satisfied, upon the evidence, that the plaintiff is not entitled to recover, and that a verdict, if rendered for the plaintiff must be set aside, the court may instruct the jury to find for the defendant. Grand Chute *v.* Winnegar, 82 U. S. 355, 21 L. Ed. 170; Marion *v.* Clark, 94 U. S. 278, 24 L. Ed. 59; Herbert *v.* Butler, 97 U. S. 319, 24 L. Ed. 958. If the court errs, as a matter of law, in so doing the remedy lies in a review in the appropriate court."

This would appear to be such an important element of judicial power as to inhere in the very organization of the courts and needful in maintaining a proper efficiency.

IT IS A POWER INHERING IN THE COURT.

"The court," says Mr. Cooley,[19] "sits to enforce the legislative will." Does it enforce it as a servant, as an agent, or as a

[18] 157 U. S. 674, 675, 39 L. Ed. 853, 854.

[19] Cooley, Constitutional Limitations, 6th ed., p. 193.

coördinate power of equal dignity, is the question proposed to be answered. Said President Keith in the case of Carter *v.* Commonwealth:[20]

> "In the courts created by the Constitution, there is an inherent power of self defense and self preservation; that this power may be regulated but cannot be destroyed, *or so far diminished as to be rendered ineffectual by legislative enactment;* that it is a power necessarily resident in and to be exercised by the court itself, and that the vice of an act which seeks to deprive courts of this inherent power is not cured by providing for its exercise by a jury. * * * The history of this court, and, indeed, of all the courts of this Commonwealth, shows the jealous care with which they have ever defended and maintained the just authority and respect due to juries, an agency in the administration of justice, but our duty, as we conceive it, requires us not to be less firm in vindicating the rightful authority and power of the courts."

If directing a verdict, as we have just seen, does not impinge upon individual rights and guarantees, there will not be found those to seriously claim that it invades the legislative department. That department, at common law, never interfered with the detailed operation of the courts. It is only by modern statutes that it has been attempted.

It Is Comprehended in the Judicial Power.

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish."[21] The synonyms of "power" are "potency" and "efficiency;" therefore, the obligation to see to it that judicial potency and efficiency is maintained, is vested in the courts and not in the legislative department. This is a condition precedent to an independent departmental status, else the courts would become the mere tools of the legislative department.

> "There is no liberty," said Montesquieu, "if the judiciary power be not separated from the legislative and executive

[20] 96 Va. 791, 816, 32 S. E. 780, 785.

[21] U. S. Constitution, Art. III, § 1.

> * * * There would be an end of everything were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting law, that of executing the public resolution and of trying the causes of individuals." [22]

This great principle is eloquently expressed in the Virginia Bill of Rights and is self evidence in the federal Constitution.

The mischievous consequences of an improper personnel upon the bench, in specific instances, has provided a legislative excuse for encroaching upon the constitutional judicial province. Inasmuch as the Congress confirmed these objectionable selections and still leaves them to work their uncertain way, justification in fact cannot be demonstrated. The thoughtful citizen, and even the man in the street is beginning to see the cause of the evil wrought by these things and, instead of the expediency of the recall, is demanding that Congress shall return to, and the courts be operated upon, first principles. There is a wholesome renaissance of the Montesquieu governmental theories that were the soul of the Bill of Rights and the spirit of the Constitution, a wholesome symptom of which is the retirement of code practice and the substitution therefor of scientific correlative rules made by the court. A brief outline of the course of the development of the practice, as nearly as may be, in the language of the courts, will now be undertaken.

Involuntary Non-Suit.

Chief Justice Marshall, in 1828, in the case of Elmore *v.* Grymes,[23] said:

> "The court * * * is of the opinion that the circuit court has no authority to order the peremptory non-suit against the will of the plaintiff. He had the right by law to a trial by jury and to have had the case submitted to them. He might agree to a non-suit, but if he did not so choose, the court could not compel him to submit to it."

But Mr. Justice Johnson, who tried the case at *nisi prius* and failed to observe an organic distinction in the procedure, filed a

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[22] Montesquieu, Spirit of the Laws, Bk. XI, Ch. 6.

[23] 1 Pet. 469, 471, 7 L. Ed. 221, 226.

spirited and well reasoned minority opinion which, in effect, has become the law and custom and, therefore, commands equal consideration.

> "I ordered," said he, "the plaintiff below to be non-suited because the evidence was so inadequate as not to maintain his suit; and had the jury found for him I would have set aside the verdict and ordered a new trial. The practice of the court in which the cause comes up is this; when the plaintiff has closed his evidence, the defendant is at liberty to move for a non-suit or to proceed with his testimony. If he introduces evidence, it is too late to move for a non-suit; and the question always to be examined, is whether, upon the evidence introduced by the plaintiff admitting it to be true, the jury can find a verdict for him. So, that it is, in fact, (1) a substitute for demurrer to evidence or (2) a motion for instruction that plaintiff can not recover, upon the case made out for him in evidence." [24]

Mindful that an involuntary non-suit may not now be ordered except when in conformity to State practice,[25] let us turn to some later opinions of the court for a confirmation of the statement just made. And in order to discuss the evolution of the practice in the language of the court, a departure from the chronological order is found convenient.

DIRECTING VERDICT EQUIVALENT TO DEMURRER TO EVIDENCE.

Mr. Justice Swayne in 1864 objected to certain instructions because,

> "In effect, they took the case from the jury * * * Where there is no dispute about the facts and the law arising upon them is conclusive against the right of the plaintiff to recover, it is proper for the court to instruct the jury accordingly. *This is equivalent to a demurrer to the evidence*, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as the foundation of a verdict for the plaintiff." [26]

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[24] 1 Pet. 469, 472, 7 L. Ed. 221, 227.

[25] United States *v.* Parker, 120 U. S. 89, 95, 30 L. Ed. 604; Gassman *v.* Jarvis, 94 Fed. 603.

[26] Schuchardt *v.* Allens, 1 Wall. 359, 369, 17 L. Ed. 642.

In Mr. Justice Miller's opinion in Pleasants *v.* Fant,[27] it is said:

> "In the case of Parks *v.* Ross, 11 How. 362, 13 L. Ed. 731 (1850), this court held that the practice of granting an instruction like the present had *superseded the ancient practice of demurrer to evidence and that it answered the same purpose and should be tested by the same rules;* * * * And in Schurchardt *v.* Allens, 1 Wall. 359, 17 L. Ed. 642 the case (Parks *v.* Ross) *is referred to as establishing the doctrine* that if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly."

It is interesting to note that twenty-two years elapsed between Elmore *v.* Grimes and Parks *v.* Ross and that the issue in the latter case arose upon the motion of the defendant, "That if the evidence is believed by the jury to be true the plaintiff is not entitled to recover." It is timely to quote the Court's exact language as follows:

> "It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, *error in the court to instruct the jury that they may find a material fact,* of which there is no evidence from which it may be legally inferred.
>
> "Hence the practice of granting an instruction like the present, which makes it *imperative upon the jury to find a verdict for the defendant, and which has in many states superseded the ancient practice of a demurrer to evidence.* It answers the same purpose and should be tested by the same rules. A demurrer to evidence admits not only the fact stated, therein, but also every conclusion which a jury might fairly or reasonably infer therefrom." [28]

What Is a Demurrer to Evidence.

Inasmuch as a comparison of the office of the ancient demurrer to the evidence with the modern practice of directing

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[27] 89 U. S. 116, 121, 22 L. Ed. 780, 783.

[28] Parks *v.* Ross, 11 How. 362, 373, 13 L. Ed. 731.

the verdict will be more effective in the light of the Supreme Court's measure of the former, it will be interesting at this point to take note of some old decisions. Said Chief Justice Marshall:

> "The party demurring admits the truth of the testimony to which he demurs and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit, but the testimony is to be taken most strongly against him; and such conclusions as a jury might justifiably draw, the court ought to draw." [29]

In the case of Banks *v.* Smith,[30] Mr. Justice Thomson said:

> "By this demurrer, the defendant has taken the questions of fact from the jury, where they properly belong, and has substituted the court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to, is to be considered as admitted. The language of the adjudged cases on this subject is very strong to show that the court will be extremely liberal in their inferences where the party demurring will take the question from the proper tribunal. It is a course of practice generally speaking, that is not calculated to promote the ends of justice."

Thus the price of a demurrer to the evidence, proved a heavy handicap to the party disputing the legal effect of the evidence. He purchased immunity from the hazard of the jury by risking the result of the case upon his knowledge of the law *and the sacrifice of the right to dispute anything the plaintiff might choose to testify,* regardless of the real facts. The former was probably justified, but the latter seems not to have been believed to be within the pale of reason or moderation, or in the interest of a helpless laity. That it was too unreasonable to hold a place within the juridical organization in England or America, subsequent history was demonstrated. A great teacher (Chas. A. Graves, University of Virginia) advised against its use except "in the defense of an action by a poor widow against a

[29] Pawling *v.* United States, 4 Cranch 219, 221, 2 L. Ed. 601.
[30] 24 U. S. 171, 179, 6 L. Ed. 443, 446.

railroad corporation for the killing of her only cow." Without agreeing with his mode of procedure, we turn for vindication to the prophetic reasoning of Mr. Justice Johnson's dissenting opinion in Elmore *v.* Grimes, for "the stone which the builders rejected is become the head of the corner" of the federal juridical structure.

> "In practice, it subserved the purposes of justice under our system, as effectually as a bill of exceptions, or a demurrer to evidence; and *in several* respects better. (1) It saves the practitioner from the weight of responsibility, which often results from being compelled to elect between a voluntary non-suit and a demurrer to evidence, or a bill of exceptions, which may terminate fatally to his clients; and (2) it not unfrequently saves his client from the fatal effects of negligence and misapprehension, either of himself or his attorney, or (3) from surprise. (4) In point of convenience and expedition in the administration of justice, I presume there cannot be two opinions." [31]

Let us now follow briefly the growth of this suggestion and see it develop into the full flower, wherein will be found every principle announced by Mr. Justice Thomson, but without violating an organic right.

Directing a Verdict Becomes a "Legal Right."

In 1874, careless counsel for the defendant after plaintiff had rested, untechnically moved the court "to decide that the evidence was not sufficient to entitle the plaintiff to a verdict."

In discussing this motion the court said:

> "Suppose the motion is regarded as a motion for a non-suit, it was clearly one which could not be granted, as it is well settled that the circuit court does not possess the power to order a peremptory non-suit against the will of the plaintiff. Elmore *v.* Grimes, 1 Pet. 469; Castle *v.* Bullard, 64 U. S. 172, 16 L. Ed. 424. * * * but the defendant may, if he sees fit, at the close of the plaintiff's case, move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and it is held that such a motion

[31] 1 Pet. 469, 473, 7 L. Ed. 221, 228.

is not one addressed to the discretion of the court, but that it *presents a question of law* and that it is as much the subject of exceptions as any other ruling of the court in the course of the trial. Schuchardt *v.* Allen, 68 U. S. 370, 17 L. Ed. 646; Parks *v.* Ross, 11 How. 362, 13 L. Ed. 731; Bliven *v.* New England Co., 64 U. S. 433, 16 L. Ed. 514. All things considered, the court is inclined, not without some hesitation, to regard the motion as one of the latter character." [32]

SHOWING FURTHER EVOLUTION OF DIRECTING THE VERDICT.

Parks *v.* Ross was decided in 1850; Mr. Justice Gray, in 1883, concisely sums up the doctrine and refers to English (we will not call it common law) authority:

"It has been recently decided by the House of Lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence, from which negligence can be reasonably and legitimately inferred, and it is for the jury to say whether from these facts, when submitted to them, negligence ought to be inferred. R. Co. *v.* Jackson, 3 App. Cas. 193." [33]

That this research made by the House of Lords was satisfactory to the Supreme Court of the United States, closes discussion that the practice in 1883 and prior thereto, was a fixture in English jurisprudence. The court had already said:

"It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, *the court is not bound to submit the case to the jury,* but may direct a verdict for the defendant."

Mr. Justice Miller had previously said:

"But we are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some *tendency* to establish a participation in the profits and the question of liability under such cir-

[32] Mercantile Co. *v.* Folsom, 85 U. S. 237, 250, 21 L. Ed. 827, 833.
[33] Randall *v.* B. & O. R. Co., 109 U. S. 478, 482, 27 L. Ed. 1005.

cumstances should have been submitted to them, with such declaration of what constitutes partnership as would enable them to decide correctly. No doubt, there are decisions to be found which go a long way to hold that if there is the *slightest tendency in any part of the evidence* to support the plaintiff's case, it must be submitted to the jury, and in the present case, if the court had so submitted it, with proper instructions, it would be difficult to say that it would have been an error of which the defendant could have complained here. But, as was said by the court in the case of The Improvement Co. *v.* Munson, 81 U. S. 448, 20 L. Ed. 872, recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury *can properly proceed to find a verdict* for the party producing it, upon whom the onus of proof is imposed. The English cases there cited fully sustain the proposition. Jewell *v.* Parr, 13 C. B. 916; Toomey *v.* L. & B. R. Co., 3 C. B. (N. S.), 146; Ryder *v.* Wombell, 4 L. R. Exch. 33." [34]

Chief Justice Taney had already said:

"It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered, as such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in the charge of the court; and if there is no evidence which they have a right to consider then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them." [35]

And Mr. Justice Clifford had used the following language in a carefully considered opinion:

"When a prayer for instruction is presented to the court and there is no evidence in the case for the consideration of the jury, it ought always to be withheld; and as a general rule, if it is given under such circumstances, it will be error in the court for the reason that its tendency may be, and often is, to mislead the jury, by withdrawing their atten-

[34] Pleasant *v.* Fant, 89 U. S. 116, 120, 22 L. Ed. 780, 781.
[35] U. S. *v.* Breitling, 61 U. S. 252, 254, 15 L. Ed. 902.

tion from the legitimate points of inquiry involved in the issue." [36]

RELATION OF JUDGE AND JURY EXACTLY DEFINED.

Prevention of Unjust Verdicts.

"It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse or passion or prejudice or from any other violation of his lawful rights in the conduct of a trial." [37]

How It Is Done.

"This is done [a] by making plain to them the issues they are to try [b] by admitting only such evidence as is proper in these issues, and rejecting all else [c] by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, [d] by setting aside a verdict which is unsupported by evidence or contrary to law." [38]

How Court Examines the Evidence.

"In the discharge of this duty it is the province of the court, either before or after the verdict, [a] to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. [b] *Not whether on all the evidence the prepondering weight is in his favor* [c] that is the business of the jury, [d] but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, [e] is it sufficient to justify a verdict? [f] If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial." [39]

When Submission Is an Idle Ceremony.

"[a] Must the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which plaintiff relied, [b] when it is clear to the judicial mind

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[36] Goodman *v.* Simonds, 61 U. S. 343, 359, 15 L. Ed. 938.
[37] Mr. Justice Miller, in Pleasants *v.* Fant, 89 U. S. 116, 121.
[38] *Ibid.* [39] *Ibid,* p. 122.

that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had?" [40]

The True Principle.

"Such a proposition is absurd, and accordingly, we hold the true principle to be, that if the court is satisfied that conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is sufficient to warrant a verdict for the plaintiff, the court should say so to the jury." [41]

Plaintiff's Recourse Ample and Appropriate.

"In such case the party can [a] submit to a non-suit and try his case again if he can strengthen it, except where local law forbids a non-suit at that state of the trial or [b] if he has done his best he must abide the judgment of the court, [c] subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict." [42]

Thus, in a brief history of the evolution of the practice of directing the verdict, the great experts, who compose the Supreme Court and who were selected on account of their peculiar ability and preparedness, have been allowed to explain a venerable custom of the courts by presenting their reasons. Every liberty loving man will do well to profit by their example, observation and vast experience, lest there be sacrificed the great common law principle composing the warp and woof of the Constitution. It is not believed that there are any who are willing to contest their wisdom and none who would sacrifice their handiwork in order to prevent, or to revenge, isolated cases of individual wrong doing.

Distinct and Independent Agencies.

A review of these two important juridical elements, as persuasive as is their merit, ancient origin, manner of adoption and successful operation, would be incomplete without a further consideration of an important practical organic feature. Inasmuch, as it

[40] *Ibid.* [41] *Ibid.* [42] *Ibid.*

tends reasonably to recognize the manifest responsibility and duty of a coördinate branch of the government and, to that extent, bring about an apparent legislative concession, it addresses itself to a sound individual discretion, a knowledge of the science of government, a broad statesmanship and an unselfish patriotism, that has not been and will not be found wanting in the halls of Congress. And, we are led up to the splendid thought that, amongst the three major departments, coördination and not jealousy nor peevish interference is the keynote of successful government; that it is impossible for the courts to operate scientifically unless they are able to put into effect rules that are recommended by observation and experience, drawn from actual operation. This is an inherent part of the Constitutional power (efficiency) they must exercise without molestation.

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